MOTION FILED
NOV 23 1993

(3)

No. 92-1956

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents

BRIEF ON BEHALF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

JAMES F. KILCUR
NORMAN HEGGE*
JOAN A. ZUBRAS
SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY
714 Market Street
Seventh Floor
Philadelphia, PA 19107
(215) 580-7664

**Counsel of Record*

PACKARD PRESS/LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

BEST AVAILABLE COPY

25 pp

No. 92-1956

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

Southeastern Pennsylvania Transportation Authority ("SEPTA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

SEPTA is a statutorily-created government agency which operates a mass transit system in the Philadelphia Metropolitan area. SEPTA also provides commuter rail lines and, therefore, is subject to the Federal Employer's

Liability Act, 45 U.S.C. §§51-60. (FELA) SEPTA has approximately 1,500 workers who are covered by FELA.

Under Pennsylvania law, negligence claims brought against SEPTA – a Commonwealth agency – are limited to the exceptions set forth in the Sovereign Immunity Act. 42 Pa. C.S.A. §8501, et seq. SEPTA has a limitation on damages under its immunity statute for tort actions, however, there is no limitation on damages under the FELA. The interest of SEPTA arises from the fact that the case will have an impact on its claims budget, as well as its operating budget. The decision will increase the cost of litigation and the payment for FELA claims. SEPTA, like many government agencies, has budgetary problems. An increase in the FELA payment will divert limited resources. Any budgetary shortfalls due to an increase in FELA payments would have to be sought through local, state or federal funding sources or an increase in the fare box.

The policy considerations for placing limitations on emotional distress claims were not fully explored by the Third Circuit. SEPTA believes that the policy concerns will not be addressed in the petitioner's brief. Therefore, this amicus brief will aid the Court in addressing the policy issues underlying the need for limitations on claims for emotional stress.

JAMES F. KILCUR
NORMAN HEGGE*
JOAN A. ZUBRAS
Attorneys for Amicus Curiae
Southeastern Pennsylvania
Transportation Authority

**Counsel of Record*

No. 92-1956

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents

BRIEF ON BEHALF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

TABLE OF CONTENTS

	Page
Table of Citations	ii
Party to Proceeding	1
Summary of Argument	1
Argument	2
A. The Third Circuit Has Failed To Provide Any Guidance With Regard To Limitations On Claims For Emotional Distress Under the FELA	2
B. The Third Circuit Has Discarded All The Limitations Articulated By The Courts For Placing Restrictions On Emotional Distress Claims	4
C. Congress Did Not Intend To Provide Recovery For Emotional Distress Under the FELA in the Absence of Some Precipitating Physical Injury	13
D. If The Court Does Not Accept The Physical Impact Test Then The Zone Of Danger Test Should Be Adopted	16
Conclusion	18

TABLE OF CITATIONS

Cases: Page

Adkins v. Seaboard System R.R., 821 F.2d 340 (6th Cir. 1987), *cert. denied*, 484 U.S. 963 (1987) 15

Angst v. Great Northern Ry., 131 F. Supp. 156 (D. Minn. 1955) 17

Antalek v. Norfolk & Western Ry., No. 82-427 (N.D. Ohio 1983), *aff'd*, 742 F.2d 1454 (6th Cir. 1984) 15

Atchison, Topeka & Sante Fe Ry. Co. v. Buell, 480 U.S. 557 (1987) 4, 16

Baltimore & Ohio R.R. v. Inman, 361 U.S. 138 (1959) 13

Brady v. Southern Ry., 320 U.S. 476 (1943)..... 13

Bullard v. Central Vermont Ry., 565 F.2d 193 (1st Cir. 1977) 15

Calabris v. W.C.A.B., 595 A.2d 765 (Pa. Cmwlth. 1991) 11

Chicago, R.R. & P.R.R. v. Lint, 217 F.2d 279 (5th Cir. 1954) 13

Consolidated Rail v. Carlisle, 990 F.2d 90 (3rd Cir. 1993) 3, 4

Ellis v. Union Pacific R.R., 329 U.S. 649 (1947) .. 13

Finn v. Consolidated Rail Corp., 622 F.Supp. 41 (D. Mass. 1985), *aff'd on other grounds*, 823 F.2d 693 (1st Cir. 1987) 15

Gaston v. Flowers Transp., 675 F. Supp. 1036 (E.D. La. 1987), *aff'd*, 866 F.2d 816 (5th Cir. 1989) 10, 17

TABLE OF CITATIONS—*(Continued)*

Cases: Page

Gillman v. Burlington N.R.R. Co., 673 F. Supp. 913 (N.D. Ill. 1987), *aff'd*, 878 F.2d 1020 (7th Cir. 1989) 17

Gottshall v. Consolidated Rail Corp., 998 F.2d 335 (3rd Cir. 1993)..... 2, 15, 10

Hinojosa v. South Texas Drilling and Exploration, Inc., 727 S.W.2d 320 (Tex. App. 1987)..... 5

Holliday v. Consolidated Rail Corp., 914 F.2d 421 (3rd Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 970 (1991) 2

Igsett v. Seaboard Coast Line R.R., 332 F. Supp. 1127 (D.S.C. 1971)..... 13

Kraus v. Consolidated Rail Corp., 723 F. Supp. 1073 (E.D.Pa. 1989), *appeal dismissed*, 899 F.2d. 1360 (3rd Cir. 1990) 12

Lancaster v. Norfolk & Western Ry. Co., 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987) 15

McSorley v. Consolidated Rail Corp., 581 F.Supp. 642 (S.D.N.Y. 1984)..... 15

Monessen Southwestern Ry. v. Morgan, 486 U.S. 330 (1988) 15

Outten v. National R.R. Passenger Corp., 928 F.2d 74 (3rd Cir. 1991)..... 17

Plaisance v. Texaco, Inc., 937 F.2d 1004 (5th Cir. 1991), *rehearing granted*, 954 F.2d 266 (1992), *opinion upon rehearing*, 966 F.2d 166 (5th Cir. 1992) (*en banc*), *cert. denied*, __ U.S. __, 113 S. Ct. 604 (1992) 9, 10

Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, *reh'g. denied*, 321 U.S. 802 (1944)..... 13

Cases: Page

Thing v. LaChusa, 48 Cal. 3d 644, 771 P.2d 814 (Cal. 1989) 6

Whiteside v. Unisys Corp., Pa. W.C.A.B. – A92-1824 (Sep. 30, 1993) 11

Wilkerson v. McCarthy, 336 U.S. 53, *reh'g. denied,* 336 U.S. 940 (1949)..... 14

Statutes:

45 U.S.C. §§51-60..... 1, 12

45 U.S.C. §54 15

45 U.S.C. §56 15

45 U.S.C. §60 15

42 Pa. C.S.A. §8501, *et. seq.* 1

Legislative History:

Senate Report No. 432, 61st Congress, 2d Session, March 27, 1910..... 13

Restatements:

Restatement of (Second) of Torts (1965) 17

Books:

A.B.A., *Report of the Action Commission to Improve The Tort Liability System* – 1987 10

Alexander D. Brooks, *Law, Psychiatry and the Mental Health System* (1974) 7

American Psychiatric Assn, Quick Reference to the Diagnostic Criteria From DSM-III-R (1987)... 7

William A. Barton, *Recovering for Psychological Injuries* (1985) 8

Books: Page

John H. Blount & J. Edward Dvorak, III, *Justice for the Injured Railroad Worker (And How to Achieve It)* (1987)..... 8

Melton, Petrila, Paytress & Slobojin, *Psychological Evaluations for the Courts* (1987) 6

Law Reviews:

Babcock and Oldfather, The Role of the Federal Employers' Liability Act in Railroad Safety, 19 Transp. L. J. 881 (1990-1991)..... 13

Baker, Why Congress Should Repeal the Federal Employers' Liability Act of 1908, 29 Harv. J. of Legis. 79 (1992)..... 6, 11

Bell, The Bell Tolls: Toward Full Tort Recovery for Psychic Injury, 36 U. Fla. L. Rev. 333 (1984) 16

Comment, Can I Collect Worker's Compensation Benefits If My Job Drives Me Crazy?, 2 Det. Coll. L. Rev. 591 (1992) 11

Comment, Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress, 33 Vill. L. Rev. 781 (1988).. 8

Crump, Evaluating Independent Torts Based Upon Intentional or "Negligent" Inflicting of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water? 34 Ariz L. Rev. 446 (1992)..... 7

Davies, Direct Actions for Emotional Harm: Is Compromise Possible?, 67 Wash. L. Rev. 1 (1992). 4

Law Reviews: Page

Herde, FELA Should It Be Abolished?, 17 Forum 407 (1981) 7

Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477 (1982)..... 10

Platt & Husband, Post-Traumatic Stress Disorder in Forensic Practice, 4 Am. J. Forensic Psychology 29 (1986) 8

Prosser, Palsgraff Revisited, 52 Mich. 1 (1953).... 5

Saphine, FELA and Rail Safety: A Response to Babcock and Oldfather — The Role of the Federal Employers' Liability Act in Railroad Safety, 19 Transp. L.J. 901 (1990-1991)..... 14

Simon & Zusman, The Effect of Contextual Factors on Psychiatrists' Perception of Illness: A Case Study, 4 J. Health & Soc. Behav. 186 (June 1983) 8

Magazines:

Reading This May Cause You Stress, *Bus. Week*, Oct. 17, 1985, at 170 11

Carribean Breezes Do Wonders for Injured Worker, *Corp. Legal Times*, Sept. 1993, at 44 7

PARTY TO PROCEEDING

Amicus Curiae Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") is a statutorily-created Pennsylvania Commonwealth agency, which operates a mass transit system in the Philadelphia Metropolitan area. SEPTA provides bus, trolley, subway-elevated and commuter rail services. Because SEPTA operates certain commuter rail lines, it is subject to the Federal Employers' Liability Act (hereinafter "FELA"), 45 U.S.C. §§51-60.

Under Pennsylvania law, negligence claims brought against SEPTA — a Commonwealth agency — are limited to the exceptions set forth in Pennsylvania's Sovereign Immunity Statute. 42 Pa. C.S.A. § 8501, *et seq.* Because it is a Commonwealth agency, subject to the FELA, it is not necessary for SEPTA to file a petition for leave to file an amicus brief.

SUMMARY OF ARGUMENT

Amicus SEPTA respectfully suggests that the test of "foreseeability" enunciated by the Third Circuit in the instant cases provides employers, their counsel and other litigants with virtually no meaningful guidance on what constitutes a claim for emotional distress under the FELA. The fact is that railworkers are from time to time subject to working conditions that are actually dangerous, to say nothing of "stressful". The risk of *physical harm* to such a worker on account of such circumstances is recognized and, at least to a degree, definable. But there is no limit, at all, on the number of people who might suffer — or claim to suffer — some emotional injury arising out of *stress*. Everyone can claim to be affected by stress. Indeed, as a practical matter, the Third Circuit's formulation precludes virtually all successful summary judgment motions and every claim must be tried. The increased costs — in judgments,

settlements and lawyers' fees — are likely to be substantial and will be very damaging to an agency, like SEPTA, with a limited budget and continuing capital needs.

Given the obvious problems presented by the Third Circuit's standard, SEPTA urges this Court to adopt a different formula that will provide standards by which an employer can assess liability. Such a standard would be consistent with the limitations imposed by other Courts of Appeal. SEPTA suggests that test should be a "physical impact" standard. Alternatively, SEPTA suggests that the "zone of danger" test, as enunciated by Conrail, be accepted. Both rules result in payment of claims that are most likely to be genuine because emotional harm inflicted when there is an impact or in the setting of a "near miss" is much more likely to be real than alleged emotional harm to a person merely witnessing an event or far-removed from the scene of an injury. Finally, either the impact or zone of danger rules can be applied with certainty and will avoid the necessity of conducting a trial in every case.

ARGUMENT

A. The Third Circuit Has Failed To Provide Any Guidance With Regard To Limitations On Claims For Emotional Distress Under the FELA

Prior to the decision in *Gottshall v. Consolidated Rail Corp.*, 998 F.2d 335 (3rd Cir. 1993), a plaintiff could not recover for emotional injury that did not result from a physical impact, or at least the threat of such impact. *See, e.g., Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3rd Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 970 (1991). The Court of Appeals for the Third Circuit has now radically departed from its prior rule. In order to compensate an admittedly sympathetic plaintiff, the Court has effectively eliminated any workable limitation on claims for emotional distress. In so doing, it has permitted bad facts to make bad law.

Gottshall does not provide the trial courts with useful instructions on how they are to determine whether a given injury is of a type appropriately compensated under the FELA While ostensibly applying the traditional common law tort requirements of breach of duty, causation, foreseeability and injury, the court has for all practical purposes left the decision to be resolved by *ad hoc* determinations by different judges as to whether a given emotional condition is or is not "foreseeable." Indeed, in *Gottshall*, the court never even identified the negligent conduct at issue, suggesting only that emotional distress might be foreseen in the case of witnessing the death of a friend. In fact, however, the damages claimed by Gottshall did not arise solely from his witnessing a friend's death: Gottshall's complaint was really about the working condition for the entire track gang.

After *Gottshall*, in *Consolidated Rail v. Carlisle*, 990 F.2d 90 (3rd Cir. 1993), the Third Circuit went further allowing a stress related claim where the only duties to be performed were those of a dispatcher. *Carlisle* severed all ties to the common law and abandoned any meaningful analysis of the character of the employer's tortious activity. It now appears that there need be no incident that causes physical impact or the threat of physical impact; there need be no incident that could be characterized as outrageous or unconscionable; there need be no incident during which a plaintiff witnesses a distressful event. Indeed, there need be no incident at all. Rather, the Third Circuit has ruled that general work conditions that create stress can be the basis for liability for emotional injury under the FELA *Carlisle*, 990 F.2d at 97. After all, the "tortious acts" that gave rise to liability in *Carlisle* were: reducing the work force; requiring employees to work longer hours; and failing to upgrade railstock and switching equipment. *Id.* at 92. Therefore, according to the Third Circuit, "tortious

activity" can include business and management decisions that, in the aggregate, cause stress to certain workers.

Contrary to this Court's instruction in *Atchison, Topeka & Sante Fe Ry. Co. v. Buell,* 480 U.S. 557, 568 (1987), that courts must consider both "the nature of the injury and the character of the tortious activity," the Third Circuit omitted an analysis of the character of the employer's tortious activity and focused solely on the nature of the plaintiff's injury. The Third Circuit reasoned that as long as the plaintiff can prove that his emotional injury is genuine, the FELA provides a remedy. *Carlisle,* 990 F.2d at 94. The Third Circuit adopted no single standard for weighing the "genuineness of emotional injury claims". *Id.* at 98. Rather, the Third Circuit suggested that indicia of the genuineness of the claim should be assessed by applying traditional negligence elements of duty, foreseeability, breach and causation. If this is the only guidance, however, the courts are left with no meaningful guidance as to what will be a valid claim and all cases must be tried. In contrast to the Third Circuit, most courts examining these common law concepts have raised legitimate concerns about the dangers associated with the claims for emotional distress and sought to place definable guidelines for recovery.

B. The Third Circuit Has Discarded All The Limitations Articulated By The Courts For Placing Restrictions On Emotional Distress Claims

Indeed, the Third Circuit has ignored the concerns voiced by most courts in attempting to place limits on claims for emotional distress. The principle concerns are: (1) unlimited liability; (2) the increase of litigation and fraudulent claims, and (3) the need for predictability. *See* Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?* 67 Wash. L. Rev. 1 (1992).

The concern for exposing defendants to potentially unlimited liability, and thereby placing too onerus a

burden on defendants' beneficial activity, has been the most lasting policy limitation for mental distress claims. As Dean Prosser stated:

> There is still the problem of an end to liability, of a place to stop. It is still unthinkable that any one shall be liable to the end of time for all of the results that follow in endless sequence from his single act. Causation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world. Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which would set society on edge and fill the courts with endless litigation.

Prosser, *Palsgraff Revisited,* 52 Mich. L. Rev. 1, 32 (1953).

But if liability for emotional distress is based solely upon foreseeability, then an employer's exposure really is unlimited. As one court pointed out, for example, every individual who saw the television coverage during The Challenger space shuttle disaster was subjected to emotional distress. *See Hinojosa v. South Texas Drilling and Exploration, Inc.,* 727 S.W.2d 320, 324 (Tex. App. 1987). For every such individual present at the location or watching television, the emotional distress was certainly foreseeable. Surely all of these millions of individuals were not suddenly afforded a cause of action. Similarly, in the case of *Gottshall,* all the track workers who were present could claim they suffered stress-related symptoms from overwork on the day in question or even upon learning about the death of a fellow track worker. Likewise, these track workers could file a claim upon learning of Mr. Gottshall's claimed injuries. Other track workers at other locations working under similar conditions could also claim they heard about the incident and then they suffered emotional distress. What the court has set the stage for is an unlimited domino effect.

Moreover, a claim for *negligent* infliction of emotional distress does not limit recovery for the intentional acts of the defendant, but rather seeks recovery for mere negligence or "carelessness." But carelessly imposed emotional harm is unavoidable in our society, and it occurs in a wide variety of situations. As the California Supreme Court has put it, "[t]he overwhelming majority of 'emotional distress' which we endure ... is not compensable." *Thing v. LaChusa*, 48 Cal. 3d 644, 667, 771 P.2d 814, 829 (1989). Even overtime or additional effort due to a major project, under *Carlisle*, could produce claims. Increased work hours due to a reduction in force, a mistake in scheduling, or sickness of co-workers can be characterized as negligent. This characterization must be resolved only by a full-scale jury trial because there would be no legally enforceable limit that would justify a dismissal or grant of summary judgment.

This leads to the second concern – increased litigation. Any suggestion that litigation will do anything other than increase[1] does not take into account the realities of litigation or the difficulty in dealing with a psychiatric claim.[2] The basis of all psychiatric diagnosis is primarily the litigant/patient. Inherently, reliability is suspect. Emotional distress claims will be the soft-tissue injury case of the 1990's. Claims of injury in both types of cases are purely subjective and damages must be proven by expert testimony. In emotional distress claims the expert diagnosis is not as simplistic as the diagnosis of compression fracture at the fourth lumbar vertebra.

1. Railroad employment has decreased by 40% in the last decade (1980: 475,930 to 1989: 261,063). Reportable injuries have decreased 60% (1980: 56,428 to 1989: 22,322). However, the FELA payout has increased 130% over the same period. (1980: $343 million to 1989: $789 million). See Baker, *Why Congress Should Repeal The Federal Employer's Liability Act of 1908*, 29 Harv. J. of Legis. 79, 104 (1992)

2. There is frequently a correlation between the litigation and continuing claims of distress. *See* Melton, Petrila, Paytress & Slobojin, *Psychological Evaluations for the Courts* 283 (1987).

Such a diagnosis involves biological or mechanical tests that would be performed by one orthopedic doctor to the next with a high degree of specificity. *See* Crump, *Evaluating Independent Torts Based Upon Intentional or "Negligent" Inflicting of Emotional Distress. How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 Ariz. L. Rev. 446, n.216 (1992). But a diagnosis of borderline personality disorder, post-traumatic stress disorder, or chronic undifferentiated schizophrenia will not be physically verifiable and requires both interpretation and subjective weighing of multiple simultaneous criteria. Moreover, the diagnostic criteria for psychological disorders usually concern manifestations that also are present in all mentally-healthy persons. Thus, the obsessive-compulsive personality disorder is diagnosed by criteria that are present in some classes of healthy people to a marked degree (e.g., lawyers). American Psychiatric Assn, Quick Reference to the Diagnostic Criteria From DSM- III-R 194-95, 146-48, 113-18 (1987) (summarizing criteria, such as "perfectionism," "preoccupation with details [and] rules," "excessive devotion to work," "overconscientiousness," and "restricted expression of affection" that are virtual survival characteristics for lawyers in high-pressure practices).[3] *Id.* at 199-200.

The point is that the manipulability of diagnostic criteria in psychiatry is of a much greater order of magnitude than dealing with objective physical symptoms.[4] *See also* Alexander D. Brooks, *Law, Psychiatry and the Mental Health System*, chs. 1-3 (1974) (describing psychiatry as it relates to law, as it defines

3. With a physical injury surveillance can be utilized to flush out fraudulent claims. *See* "Carribean Breezes Do Wonders for Injured Worker," *Corp. Legal Times*, Sept. 1993, at 44. In a psychiatric claim the effectiveness of surveillance is limited.

4. Further, in FELA claims, a claims attorney works on a contingency of 30-40%, therefore, there is an incentive to buildup the damages and, therefore, the treatment. *See* Herde, *FELA: Should It Be Abolished?*, 17 Forum 407 (1981).

mental illness, and as a behavioral science). There will always be a psychiatrist to testify for the plaintiff. Indeed, expanding recovery for emotional distress will result in a cottage industry for psychiatrists who will testify on behalf of plaintiffs or defendants.[5] As one commentator stated:

> Psychiatrists agree in a much smaller percentage of diagnoses than most other kinds of health-related professionals. Diagnostic criteria are numerous, diffuse and extraordinarily malleable. Accordingly, diagnoses of psychic injuries are subject to ready manipulation by partisan witnesses. Although the same sort of partisan cottage industries exist in a wide variety of other cases (at great cost) the manipulation of the resulting psychiatric evidence could be expected vastly to exceed the distortions in most other cases.
>
> These disadvantages might be tolerable if liability were confined to the kind of outrageous conduct involved in the tort of intentional infliction of severe emotional distress. But when the underlying tort itself is unbounded, as the negligent infliction tort is, the danger arises that a skillful, motivated attorney can contrive very large damages for conduct not really demarcated as culpable.[6]

Crump, supra, at 475.

---

5. For an example of the partisan view of experts, *see* William A. Barton, *Recovering from Psychological Injuries* (1985). This publication by the American Trial Lawyers Association begins, "This is a plaintiff's cookbook filled with proven recipes. . . ." *Id.* at ch. XV, 6. Further, a book informing railroad workers of their rights suggests that they answer as little as possible about an accident. *See,* John H. Blount & J. Edward Dvorak, III, *Justice for the Injured Railroad Worker (And How to Achieve It)* 3-5 (1987). Obviously, after consulting with an attorney or union representative the accident report can be phrased in a way to establish the railroad's negligence.

6. *See* Platt & Husband, *Post-Traumatic Stress Disorder in Forensic Practice,* 4 Am. J. Forensic Psychology 29 (1986). These authors describe this phenonemon, which they term "role enactment" as a process in which the litigant picks up subtle clues from the attorneys or treating professionals as to the symptoms they might be expected to have. *Id.* at 35. The questions and messages communicated by the professionals may have the effect of covertly influencing the litigant to report additional symptoms, or may reinforce the degree and severity of existing symptoms. This process may be conscious or unconscious. *Id. See also* Simon & Zusman, *The Effect of Contextual Factors on Psychiatrists' Perception of Illness: A Case Study,* 24 J. Health & Soc. Behav. 186 (June 1983). These authors discovered empirically that mental health experts' diagnostic and prognostic decisions correlated highly with the practitioner's forensic position (whether the expert worked for the plaintiff or defendant). *Id.* at 191. For a further discussion, *see* Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress,* 33 Vill. L. Rev. 781, 817-23 (1988).

Further, reduction of everything to a "foreseeability" test will never permit a summary judgment motion and will result in increased jury trials and increased costs. Even learned judges disagree on what is foreseeable. The difficulty with the foreseeability standard is highlighted by the case of *Plaisance v. Texaco, Inc.,* 937 F.2d 1004 (5th Cir. 1991), *rehearing granted,* 954 F.2d 266 (1992), *opinion upon rehearing,* 966 F.2d 166 (5th Cir. 1992) (en banc), *cert. denied,* ____U.S. ____, 113 S.Ct. 604 (1992). The plaintiff, a seaman, claimed psychic injury from merely seeing an explosion and fire that neither caused nor threatened injury to anyone. A claim was brought under the Jones Act, an act covering Maritime employees, and its underlying statutory structure, the FELA. *Id.* at 1006. His psychiatrist diagnosed post-traumatic stress disorder, a diagnosis that the Fifth Circuit panel described as "baffl[ing]". 937 F.2d at 1011. The Fifth Circuit, addressing the issue of "foreseeability" held that the injury was not a reasonably foreseeable consequence for an experienced seaman. The entire Fifth Circuit then undertook *en banc* review of *Plaisance* on its own motion. The *en banc* court ultimately rejected full recovery for negligently inflicted emotional distress in the FELA context. It cited a

previous decision, *Gaston v. Flowers Transp.*, 675 F.Supp. 1036 (E.D.La. 1987), *aff'd*, 866 F.2d 816 (5th Cir. 1989), in which a panel of the court had discussed the policy reasons for rejecting a negligently inflicted emotional distress claim: "potentially ruinous liability", "feigned injuries and bogus claims", "exponential damages awarded" in a "random and wayward fashion", and "the difficulty of insuring excessive levels of unpredictable liability." 866 F.2d at 820. The facts of the *Plaisance* case are themselves a strong argument against the negligent-infliction tort: the necessity of three different levels of review to decide *Plaisance* – district court, appellate panel, and *en banc* court-demonstrates the disproportionate costs, manipulable damages, and difficulty of screening out unmeritorious claims that would result if the negligent-infliction tort were recognized in a FELA context.[7] If the test utilized was an impact test, a zone of danger test, or even a bystander test, then summary judgment could have been granted since *Plaisance* could not meet any of these standards. Plaisance suffered no impact, was not in a zone of danger (since another boat was on fire) and there were no injuries to a close relative.

The foreseeability test will result in an increased number of trials. Individuals will not know with certainty if they have a valid claim and employers will not know whether they are liable until all appeals have been exhausted. The Third Circuit's opening of the floodgates not only results in increased costs to employers but also to the court system.[8]

---

7. Ever in *Gottshall* there was a split of opinion as to foreseeability. Judge Roth dissented on the grounds that any duty violated was to the decedent and not to Gottshall. Judge Roth stated, "the impact on James Gottshall of any negligence on the part of Conrail could not have been reasonably foreseeable." 988 F.2d at 384.

8. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 507-08 (1982); A.B.A., Report of the Action

Because every rail employee is likely to experience some degree of emotional distress, adoption of the position espoused by the Third Circuit would bring every allegation of a headache or disenchantment-induced stress suffered by a rail employee within the province of the FELA. Disagreements between supervisors and subordinates about the workload and/or conditions in the work place exist in every place of employment. Under the Third Circuit standard, a railroad employee has ready access to a jury trial in federal or state court. A railroad employee is no more susceptible to the mental distress that may result in connection with workplace disagreements or stresses than any employee in any other industry. Moreover, other workers are subject to workmen's compensation statutes, which impose limitations on their recoveries for work-related stress.[9] The

---

Commission to Improve The Tort Liability System – 1987. Recommendations have been made to repeal the FELA due to increased burdens on the court system. *See* Baker, *supra note* 1, at 87-89.

9. Significantly, an employee in Pennsylvania who sues for physical injuries suffered as a result of psychological stimulus must prove that the symptoms are "physical injuries" and not simply that the symptoms are merely a manifestation of stress. There must be long lasting physical injury once the cause of mental anguish has been eliminated. *See, e.g., Whiteside v. Unisys Corp.*, W.C.A.B. – A92-1824 (Sept. 30, 1993). Further, the conditions must be abnormal. *See. Calabris v. W.C.A.B.*, 141 Pa. Commw. 405, 595 A.2d 765 (1991). In states which have liberal standards for stress-related workmen's compensation claims, such as Michigan, there is a movement for legislative reform. Comment, *Can I Collect Worker's Compensation Benefits If My Job Drives Me Crazy?*, 2 Det. Coll. L. Rev. 591 (1992); "Reading This May Cause You Stress," *Bus. Week*, Oct. 14, 1985 at 170 reads as follows:

> Most business and professional people insist, usually with pride, that they work under pressure that would fracture lesser mortals. Yuppies in particular regard stressful jobs as status symbols. But not everybody is a yuppie, and more and more employees are saying that they cannot stand up under the stress of their jobs. Some of them are demanding – and getting – hefty payments from employers who subject them to what a court or compensation board thinks is unfair stress.
>
> Figuring out what constitutes unfair stress must be pretty

court noted in *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073, 1090 (E.D. Pa. 1989), *appeal dismissed*, 899 F.2d 1360 (3rd Cir. 1990):

> [P]laintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or illnesses caused by their general working conditions, fail to state a claim under the FELA. Lawyers, doctors, bus drivers, police officers, laborers, and yes, even judges, face stressful conditions every working day. To suggest that Congress intended to single out railroad workers (and seamen under the Jones Act) as worthy of special protection from such stress would be pure folly. Job-related stress is simply not the type of problem intended to be dealt with by the FELA.

Permitting FELA claims for wholly mental injuries will inhibit the exercise of management prerogative and the smooth operation of the nation's railroads.[10] Railroad

NOTES *(Continued)*

stressful itself. At least it is leading to some rather peculiar outcomes. The Kentucky Workers' Compensation Board awarded Gary Pearl, a white sanitation worker in Louisville, maximum benefits and a job change because he could not endure the stress of working with blacks. A woman won an award because she suffered a nervous breakdown when her employer told her she was being transferred.

Let's all keep calm and ask quietly: What in heaven's name is going on here? Will employers have to redesign jobs to eliminate stress? Stress is an elusive phenomenon, determined by motivations and incentives. My stress may be your challenge. What will happen when to already lagging U.S. productivity, to the struggle to compete with Japan and other countries, if people who can't cope with stress in their jobs are rewarded with resources produced by people who can? It may be too much to expect judges and compensation boards to ponder such issues. But the rest of us should.

10. Both plaintiffs in *Gottshall* and *Carlisle* had disputes concerning their working conditions which could have been resolved through the grievance mechanism in place in their collective bargaining agreement.

employers should not have to confront the prospect of FELA litigation absent actual or threatened physical contact[11] which the statute was intended to redress. Such a result is at odds with the FELA's legislative intent and public policy.[12]

C. Congress Did Not Intend To Provide Recovery For Emotional Distress Under the FELA in the Absence of Some Precipitating Physical Injury

The Third Circuit's new rule goes well beyond what Congress intended when it passed the FELA. The types of injuries that Congress intended to cover are described in the Act's legislative history. Senate Report No. 432, 61st Congress, 2d Session, March 27, 1910, at page 2, sets out the types of injuries the FELA was enacted to redress.[13]

11. Employees sometimes stay out so as to increase an FELA recovery. A report filed by Amtrak indicated that two years after one accident only one employee out of eleven returned to work and in a minor derailment in which *no* passengers were injured all fifteen employees claimed injury and had not returned to work. *Baker, supra*, at 103. Indeed, the trend was towards employees not returning. *Id.*

12. The FELA is a federal negligence statute that applies to the railroad industry. 45 U.S.C. §§ 51-60. Liability is not absolute. *Brady v. Southern Ry.*, 320 U.S. 476, 483-84 (1943); *Baltimore & Ohio R.R. v. Inman*, 361 U.S. 138, 140 (1959). It has been well established under the FELA that an employee could not recover by merely proving that the work involved was difficult or inconvenient. An employee had to prove that the railroad was negligent. The basis of the railroad's liability under the FELA is negligence, *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32-33, *reh'g. denied*, 321 U.S. 802 (1944), not the mere fact that an injury may have occurred to its employee. *Ellis v. Union Pacific R.R.*, 329 U.S. 649, 653 (1947); *Chicago, R.R. & P.R.R. Co. v. Lint*, 217 F.2d 279, 281 (8th Cir. 1954); *Igsett v. Seaboard Coast Line R.R.*, 332 F. Supp. 1127 (D.S.C. 1971).

13. There is a current debate on whether or not the railroad industry remains as dangerous as when the FELA was enacted. Babcock and Oldfather, The Role of the Federal Employers' Liability Act in Railroad Safety, 19 Transp. L. J. 881 (1990-1991) Notably,

> This subject is referred to here only for the purpose of calling upon Congress to make entirely manifest the good faith of the legislature in the enactment of the employers' liability law, which places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the *lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling.* The total casualties to train men on the interstate railroads of the United States for the year 1908 was 281,645. *It was the intention of Congress in the enactment of this law originally, and it may be presumed to be in the intention of the present Congress to shift the burden of the loss resulting from these casualties* from "those least able to bear it," and place it upon those who can, as the Supreme Court said in the *Taylor* case, "measurably control their losses."

(emphasis added).

It is clear that Congress neither intended nor anticipated that the Act would provide relief for non-physical or solely *stress induced* injuries. Congress spoke only to physical injuries. Justice Douglas, concurring in *Wilkerson v. McCarthy,* 336 U.S. 53, 68, *reh'g denied,* 336 U.S. 940 (1949), best described the intent of Congress on this point when he said, "[t]he Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." We cannot assume that Congress *sub silentio* intended the FELA to provide

NOTES *(Continued)*

50% of the injuries under FELA were sprains and strains. In 1988, there were 64 amputations and 1,289 fractures. The fractures presumably included fingers and toes. The construction, mining, and manufacturing industries had higher amputations rates and the mining and construction industries had a higher fracture rate. *See,* D. Saphine, *FELA and Rail Safety: A Response to Babcock and Oldfather – The Role of the Federal Employers' Liability Act in Railroad Safety,* 19 Transp. L.J. 901 (1990-1991).

coverage for wholly *stress induced* injuries. *See Monessen Southwestern Ry. v. Morgan,* 486 U.S. 330, 337-39 (1988) (Congress's silence on issue of prejudgment interest under FELA indicates its intent not to permit recovery of such interest). Congress has never attempted, then or now to amend the FELA to provide coverage for wholly *stress induced* injuries.[14]

The courts have long acknowledged that the FELA was designed to protect railroad employees who are physically injured or killed at work. Furthermore, the courts have uniformly upheld the intent of Congress that there can be no recovery for emotional distress under the FELA without some precipitating physical injury. *See Adkins v. Seaboard System R.R.,* 821 F.2d 340, 341-42 (6th Cir.), *cert. denied,* 484 U.S. 963 (1987); *Antalek v. Norfolk & Western Ry.,* No. 82-427 (N.D. Ohio 1983), *aff'd,* 742 F.2d 1454 (6th Cir. 1984); *Bullard v. Central Vermont Ry., Inc.,* 565 F.2d 193, 197 (1st Cir. 1977); *Finn v. Consolidated Rail Corp.,* 622 F. Supp. 41, 43 (D. Mass. 1985), *aff'd on other grounds,* 782 F.2d 13 (1st Cir. 1986); *Lancaster v. Norfolk & Western Ry. Co.,* 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied,* 480 U.S. 945 (1987); *McSorley v. Consolidated Rail Corp.,* 581 F. Supp. 642, 645 (S.D.N.Y. 1984).

In *Lancaster, supra,* 773 F.2d at 813, the Seventh Circuit thoroughly reviewed the Act's history and federal

14. Congress has amended the FELA on several occasions since 1908. In 1910, Congress amended the FELA to allow concurrent state and federal jurisdiction. The amendment also expanded the venue provisions to allow an employee to file suit in any jurisdiction where the defendant resided, or did business, or where the cause of action arose. 36 Stat. 291 (1910), codified at 45 U.S.C. §56. In 1939, Congress eliminated the assumption of risk defense for all cases, extended the limitation period to three years, and added provisions to prevent interference with any person attempting to provide information on a FELA claim. 53 Stat. 1404 (1939), codified at 45 U.S.C. §§54, 56, 60. Therefore, if wholly *stress induced* injuries are to be actionable under the FELA, then like prejudgment interest, "Congress must expressly so provide." *Monessen, supra,* 486 U.S. at 339.

common law on the issue and determined that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact" because the Act addresses "the security of the person from physical invasions." The *Lancaster* ruling was based on a careful consideration of existing federal common law under which no cases allowed FELA recovery for mental injury where the "physical dimension" was lacking. *Id.* Thus, under *Lancaster*, a claim of intentional infliction of emotional distress is not actionable absent allegations of assault or battery, and a claim for negligent infliction of emotional distress is not actionable unless it is a "physical" tort, that is, unless it involves actual or threatened physical contact.

In *Atchison, supra,* 480 U.S. at 557, this Court declined the opportunity to hold that a claim for emotional distress can be made absent physical injury. Indeed, this Court noted that the majority of states required physical contact or the claimant to be in a zone of danger. The physical impact test, in other words, has support in the legislative history and judicial precedent. The test also has the advantage that it can be applied with ease and predictability.[15]

D. If The Court Does Not Accept The Physical Impact Test Then The Zone Of Danger Test Should Be Adopted

If SEPTA's suggested test of physical impact is not adopted, then Conrail's zone of danger test should be accepted. Several states have allowed recovery for claims of negligent infliction of emotional distress as a result of

15. Of course, the test may preclude recovery in certain extreme instances and award damages for a minor impact in other less sympathetic cases. However, no test is free of some arbitrary limits. *See, e.g.,* Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury,* 36 U. Fla. L. Rev. 333, 337 (1984) (discussing the lengths that courts have gone to in order to find an "impact".)

being placed in a zone of danger. The zone of danger test can also be applied in a concrete and consistent fashion. The test is limited to those who are placed in imminent risk of physical harm and does not expand the zone to those who are foreseeably at risk for emotional harm. *See* Restatement of (Second) of Torts §436 (1965). The cases that have specifically applied the zone of danger concept to the FELA have uniformly adopted the following principles: (1) the individual must have been in a zone of danger (high risk of physical injury from defendant's negligent act); (2) the individual must have felt contemporaneous fear for his safety; and (3) the individual must show some physical injury or illness as a result of his emotional distress. *Gillman v. Burlington N.R.R. Co.,* 673 F. Supp. 913, 917 (N.D. Ill. 1987), *aff'd.,* 878 F.2d 1020 (7th Cir. 1989); *Outten v. National R.R. Passenger Corp.,* 928 F.2d 74 (3rd Cir. 1991); *Angst v. Great Northern Ry.*, 131 F. Supp. 156 (D. Minn. 1955); *Gaston v. Flowers Transp.,* 675 F.Supp 1036 (E.D.La. 1987), *aff'd,* 866 F.2d 816 (5th Cir. 1989).

The experience of the common law precedent clearly demonstrates that a zone of danger test is workable. Tests that involve an assessment of the foreseeability of emotional injury ultimately expand towards unlimited liability because there will always be expanding arguments for foreseeability. In contrast, by restricting recovery for emotional injury to those people who experience or are threatened with physical impact, a defendant's potential liability will be limited. Summary judgment motions can be filed and litigation avoided. Valid claims will be paid, and the scope of recovery will be in accordance with the law for common law claims of emotional distress.

CONCLUSION

The FELA does not require a railroad to be an insurer of its employees' emotional health but the foreseeability standard does. Further, the FELA was not enacted to allow an employee to recover for job related stress due to the performance of the duties required to be performed. In contrast, the foreseeability standard adopted in *Gottshall* and *Carlisle* imposes liability for every day working conditions. The foreseeability standard is in actuality a non-standard and will result in the trial of every stress claim. This will increase the workload and costs to an already burdened court system. Moreover, it will increase cost to operators of the rail system, their passengers and, in many instances, to the taxpayers of state-run transit systems. The adoption of standard requiring physical impact or a threat of physical impact is consistent with policies of the FELA and the law of negligence followed in the majority of states. Further, these standards will provide guidance to the courts, their employers and ensure the payment of valid claims.

JAMES F. KILCUR
NORMAN HEGGE, JR.
JOAN A. ZUBRAS
Attorneys for Amicus Curiae
SEPTA